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KEALI'I S. LOPEZ
DIRECTOR

TO THE HOUSE COMMITTEE ON JUDICIARY
TWENTY-SIXTH LEGISLATURE
REGULAR SESSION OF 2012

Date: Tuesday, February 7, 2012
Time: 2:00 p.m.
Conference Room: 325

TESTIMONY FOR HEARING ON HB 1967, HD 1
RELATING TO MEDICAL CLAIM CONCILIATION

TO THE HONORABLE GILBERT S.C. KEITH-AGARAN, CHAIR & THE HONORABLE KARL RHOADS, VICE CHAIR, AND MEMBERS OF THE COMMITTEE:

The Office of Administrative Hearings (OAH) of the Department of Commerce and Consumer Affairs ("DCCA") appreciates the opportunity to offer comments for the Committee's Hearing on HB 1967, HD 1, relating to Medical Claim Conciliation. My name is David Karlen, the Senior Hearings Officer of the OAH.

The OAH has administered the Medical Claims Conciliation Panel (MCCP) since it was initiated by the Legislature in 1976 as part of Chapter 671 of the

Hawaii Revised Statutes. Its perspective on this proposed major revamping of the MCCP Program is important to the success of the anticipated "new look" of the Program.

The OAH is supportive of the primary goal of the proposed legislation to move MCCP proceedings away from the connotations of an adversarial process and towards an emphasis on communication and conciliation. However, OAH respectfully advocates that HB 1967, HD 1, needs to be improved in two major areas. Unless this occurs, the potential success of the new program will be in serious doubt.

1. Training of the conciliation panels should be provided—the proposed legislation is silent on this all-important subject.

Previous written testimony in support of HB 1967 recognized that the major shift into conciliation function will place "a heavy burden" to "educate doctors, patients and legal representatives of the new role of the MCCP." As the legislation's proponents recognize, mediation and conciliation skills are not the same as those involved with evaluating claims in an adversarial setting.

However, the proposed legislation does not make any provision for training present MCCP panel participants or obtaining new MCCP panel members who are attuned to conciliation. In addition, the proposed legislation proposes no funding for this training. Instead, the proponents appear to rely on a mere hope that volunteerism will somehow materialize to take care of this crucial factor. The OAH believes that the recruitment and training activities cannot be left to an unorganized hope that somehow it will all work out.

The OAH has recently been in the forefront of developing the mechanics of a dispute resolution process for the Mortgage Foreclosure Dispute Resolution Program (MFDRP) established by Act 48 of the 2011 Legislature. Our experience has shown that it takes time, and money, to organize the training of the dispute resolution neutrals for that program even though all participants were already attorneys and/or real estate professionals familiar with the basics of mortgages and foreclosures. The OAH was able to organize such training on both Oahu and the island of Hawaii, but it took time and money to do so. The new MCCP will need a similar program to prepare its panels for the conciliation process.

Accordingly, the OAH proposes that the present legislation be amended to delay the effective date of the legislation to January 1, 2013 to allow the OAH to ascertain the renewed or new panel members interested in the conciliation process. During that time, OAH will work with the bill's sponsors to administer and fund a training program in conciliation.

2. The vague and undefined requirement to "meaningfully participate" should be eliminated because it is directly counter to the goal of conciliation, provides the panel with the power to eliminate future lawsuits with no standards to guide or control that power, and invites substantial future litigation over the validity of a determination of a failure to "meaningfully participate."

After the major shift from an adversarial proceeding to one of conciliation and potential reconciliation, the proposed legislation has unfortunately made the conciliation panels adversarial in nature by giving them the power under

proposed Section 671-15 to determine that one party did not "meaningfully participate" in the proceedings. This is a completely vague provision with significant consequences—under Section 671-16 of the proposed legislation, a plaintiff cannot institute litigation if there has been a determination that there was no "meaningful participation" in the conciliation process. However, there are no consequences if a health care provider fails to "meaningfully participate."

From the start, therefore, the conciliation process becomes adversarial in tone because potential defendants will seek to convince the panels that a potential plaintiff did not "meaningfully participate." Without any significant consequence to potential defendants if they do not "meaningfully participate," potential plaintiffs will view the conciliation process as fraught with peril to them, and this will apply both to *pro se* parties against which this provision is supposed to be directed and parties represented by attorneys.

The OAH is opposed to giving private individuals the ability to preclude anyone from filing a lawsuit based on a totally undefined standard.

The OAH can predict that any determination of a lack of meaningful participation will lead to mini-litigation over the validity of that determination by anyone precluded from being a plaintiff. The OAH can also predict that many defendants will claim that a panel should have made a determination of a lack of a meaningful participation in order to dismiss future lawsuit—indeed, defense counsel would be under a duty to their clients to make such a claim if there was a reasonably arguable possibility the panel made a mistake in this area.

The consequences of this one-sided extreme punishment of potential plaintiffs would be disastrous for the intent, and image, of the new program to be one of conciliation and would lead to more litigation rather than less litigation. The OAH strongly opposed this provision and urges the Committee to remove all references to the requirement to "meaningfully participate" that are in proposed Sections 671-15 (eliminate the entire last sentence), Section 671-16 , and Section 671-16.5

Thank you for the opportunity for OAH to provide its comments on this proposed legislation.

TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) IN SUPPORT OF H.B. NO. 1967, HD 1

To: Chairman Gilbert Keith-Agaran and Members of the House Committee on Judiciary:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in support of H.B. No. 1967, HD 1, relating to Medical Claim Conciliation.

Beginning in late 2010, individuals interested in improving Hawaii's health care claims environment began meeting at the John A. Burns School of Medicine. Participants included faculty from the medical and law schools, attorneys representing both plaintiffs and defense, and representatives of the Hawaii Medical Association. The meetings were initiated and led by Dr. David Sakamoto, Deputy Director of Health, and Dr. Kelly Withy, associate professor of medicine and Director of the Hawaii/Pacific Basin Area Health Education Center (AHEC). I was one of the participants representing the plaintiff's perspective.

H.B. No. 1967, HD 1 is a consensus proposal for amendments to the current Medical Claims Conciliation Panel (MCCP) law to reduce the current adversarial nature of the process and instead to emphasize its originally intended conciliation role. These amendments will make the process of addressing and resolving questions related to medical treatment that is associated with patient injuries or deaths more efficient and less intimidating for both patients and doctors, while reducing unintended consequences created by the current adversarial process. These consequences include the emotional toll that the adversarial process extracts from its participants, the perception on the part of doctors that the process is unfriendly, the potential that an adversarial proceeding early in

the claim process may make it harder to resolve claims amicably between doctors and patients, and the unnecessary need for doctors to live with the stigma of malpractice claims when such claims are actually in the nature of inquiries. The proposed amendments therefore emphasize communication and conciliation, rather than adversarial proceedings which tend to polarize the parties and their positions.

Recent years have seen the development of alternative dispute resolution (ADR) procedures, such as mediation and arbitration, into an important means of resolving claims in place of or in conjunction with traditional litigation. These amendments recognize that many, if not most, major medical claims now involve mediation or arbitration as an integral part of the process and permits the use of ADR in lieu of participation in the MCCP process. In part this is because there is now a well developed and highly trained supply of skilled mediators available in Hawaii. As a result, many parties now prefer to use professional mediators instead of volunteer MCCP panelists who tend to lack specialized ADR training. This recognizes what is happening in actual practice and eliminates the need for DCCA to administer and conduct MCCP proceedings where they are redundant and unnecessary because the parties will utilize ADR to accomplish the same purpose.

The successful use of mediation principles to resolve legal claims supports the change in emphasis of the MCCP to conciliation. The focus of the MCCP will no longer be as a decision-maker, but will instead be as a peace-maker. The decision-making function of the MCCP is replaced with a conciliation function. The purpose of the MCCP will no longer be to determine blame, but instead to facilitate communication and encourage amicable resolution of disputes between doctors and patients.

The participants in the meetings which culminated in these proposed changes recognize that a heavy burden will fall on them to educate doctors, patients and legal representatives of the new role of the MCCP and reduced burden on DCCA. They have already begun to discuss what the Hawaii Medical Association, medical and law school faculty, private attorneys and administration must do to assure successful implementation of these amendments.

Much time, thought and effort has been put into these amendments and your favorable consideration in hearing this matter is appreciated. We look forward to working with you in improving the MCCP process. Thank you very much for allowing me to testify in Support of this measure. Please feel free to contact me should you have any questions or desire additional information.

HAWAII MEDICAL ASSOCIATION
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Tuesday, February 7, 2012
2:00 P.M.
Conference Room 325

To: COMMITTEE JUDICIARY
Rep. Gilbert S.C. Keith-Agaran, Chair
Rep. Karl Rhoads, Vice Chair

From: Hawaii Medical Association
Dr. Roger Kimura, MD, President
Linda Rasmussen, MD, Legislative Co-Chair
Dr. Joseph Zobian, MD, Legislative Co-Chair
Dr. Christopher Flanders, DO, Executive Director
Lauren Zirbel, Community and Government Relations

Re: HB 1967 HD 1 RELATING TO MEDICAL CLAIM CONCILIATION

In Support

Chairs & Committee Members:

For over a decade HMA has been attempting to legislatively address the fact that our doctor shortage in Hawaii is caused in part by high malpractice insurance costs and an unfriendly liability system. This bill represents a compromise that all parties can agree to. HMA supports this measure and is hopeful that it will reduce Hawaii's medical liability costs and thus help aid the effort to provide greater access to care to Hawaii's residents.

Thank you for the opportunity to testify.

Hawaii State Legislature

Testimony of Kelley Withy, MD, PhD

February, 2012

I am writing to offer my strongest support for HB1967. I lead the Hawaii Physician Workforce Assessment team and our results indicate that the State of Hawaii has the equivalent of 2,860 full time physicians caring for the civilian population. We need 3,500 full time physicians (determined by the organization that analyzes physician demand for the US government). Thus, we have **600 fewer physicians than are needed**. This is compounded by the fact that we are significantly **short of nurse practitioners and physician assistants**. If we do not take action now, by 2020 we may be 1,600 physicians short of what is needed and we will all find it very difficult to receive appropriate medical care.

In order to mitigate the shortage problem, ten interventions have been prioritized by Hawaii healthcare experts and stakeholders at the Hawaii Physician Workforce Summit organized by the physician workforce research team on June 29, 2010. These solutions include investing in pipeline activities that get more local students into healthcare careers, expanding medical training particularly in areas and specialties of need, improving incentives for physicians to practice on the neighbor islands, involving communities in the recruitment and retention of physicians, creating a more favorable physician practice environment (**tort reform** and reimbursement reform) and changing the model of care toward a team-based "patient-centered medical home" that, in time, can become an integrated delivery system using electronic health records that will increase physician productivity, improve quality and patient safety, lower cost, and produce greater patient and provider satisfaction.

HB1967 is a direct outcome of the Physician Workforce Summit and is the culmination of 15 months of meetings between attorneys and physicians. I believe that it is a small, but very important, step in the right direction of supporting the physician workforce in Hawaii by decreasing the burden of unfounded and uninformed lawsuits on physicians, while at the same time protecting the public and their right to seek understanding and compensation. This will allow individuals to seek understanding of the situation a medical situation from an expert panel before filing for a malpractice case, thus protecting the physician from that heart wrenching feeling of being accused of causing intentional harm to another human being (the antithesis of the purpose of medicine), and allowing patients go gain understanding of what happened in a safe and non-threating manner. It will in no way prevent individuals from following a course to trial, but we hope it will dampen the emotional suffering of both patients and physicians in Hawaii.

Thank you for allowing me to provide testimony. I am happy to provide any additional information needed regarding the research or developing solutions.

Sincerely,

Kell Withy MD

Kelley Withy, cell 808-429-8712